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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JERRY DUNCAN, Plaintiff and Appellant, v. BRUCE McCORMACK, Defendant and Respondent.	A139362 (San Francisco City & County Super. Ct. No. CGC-09-490457)

Jerry Duncan appeals from the court's order awarding costs to respondent Dr. Bruce McCormack in this medical malpractice action. He contends that the court erred in its allocation of costs to a dismissed codefendant and in its award of costs for an expert witness. He also argues that the court should have disallowed costs pursuant to Code of Civil Procedure[1] section 998 because Dr. McCormack's settlement offer was not made in good faith. We affirm.

I. FACTUAL BACKGROUND

We have previously set forth the facts of the malpractice action in the related appeal, *Duncan v. McCormack* (Mar. 9, 2015, A138211 [nonpub.opn.]). Duncan alleged that Drs. McCormack and Edward Eyster were negligent in performing a foraminotomy surgery resulting in the loss of use of Duncan's right arm. (*Id.* at pp. 3-4.) Prior to trial, Dr. McCormack served an offer to compromise pursuant to section 998, proposing a

[1] All further statutory references are to the Code of Civil Procedure.

dismissal in exchange for a waiver of costs.[2] Duncan rejected the offer. Following Duncan's presentation of his case, the court granted Dr. McCormack's motion for nonsuit. (*Id.* at p. 4.) We affirmed the trial court's judgment of dismissal. (*Id.* at p. 1.)

After the trial, Dr. McCormack filed a costs memorandum seeking an award of costs in the amount of $26,491.77. Duncan moved to tax costs, claiming that certain costs were unnecessary or unreasonable in amount, and that Dr. McCormack's section 998 offer was not made in good faith. The trial court granted the motion in part and denied it in part. The court granted the request to tax filing fees and deposition fees, and reduced the cost award by $956.40 to reflect these adjustments. The court also granted that part of the motion that sought to tax costs attributable to the defense of former codefendant Dr. Eyster, finding that five percent of all costs incurred prior to the date of Dr. Eyster's dismissal from the case was a reasonable allocation and reduced the award by $453.51 for this adjustment. The court denied Duncan's requests to tax expert witness fees, ruling that Dr. McCormack's offer to compromise pursuant to section 998 was reasonable and in good faith. The court, however, found that Dr. McCormack was not entitled to $325.00 of the $7,475.00 expert witness fees incurred for the preparation of declarations submitted in support of his motions for summary judgment. The court ordered total costs in the amount of $24,756.86.

II. DISCUSSION

Duncan contends that the trial court abused its discretion in allocating just five percent of the costs incurred to Dr. Eyster who was dismissed from the case. He argues that the court arbitrarily arrived at the figure based on its review of *Slavin v. Fink* (1994) 25 Cal.App.4th 722 (*Slavin*). We review the trial court's award of costs for abuse of discretion. (*Evers v. Cornelson* (1984) 163 Cal.App.3d 310, 314.)

Preliminarily, we address Dr. McCormack's argument that Duncan has failed to designate a proper record on appeal. On our own motion, we have taken judicial notice

[2] The complaint against Dr. Eyster was dismissed on September 22, 2011, in exchange for a waiver of costs.

of the record of the trial which was before this court in Case No. A138211. (See Evid. Code, § 452, subd. (d).) In the case before us, the court's minutes for the hearing on the motion to tax costs reflect that the hearing was not on the record. We thus have the entire record of the proceedings below to consider the court's award.

Section 1032, subdivision (b) provides that "a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." A prevailing party "includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." (§ 1032, subd. (a)(4).)

" 'A prevailing party is entitled to recover only those costs actually incurred by that party or on that party's behalf in prosecuting or defending the action. When a prevailing party has incurred costs jointly with one or more other parties who are not prevailing parties for purposes of an award of costs, the judge must apportion the costs between the parties.' [Citations.]" (*Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 986, disapproved on other grounds in *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1330.)[3]

Here, the court determined that only five percent of the costs were attributable to the defense of Dr. Eyster, who was dismissed prior to the trial in this case. The court's ruling was not an abuse of discretion. (See *Slavin, supra*, 25 Cal.App.4th 722 [allocating five percent of the costs to agent of defendant property owner where defendants were

[3] "The unity of interest principle, which vests the trial court with discretion to deny or apportion costs otherwise recoverable by a prevailing party defendant, is rooted in the language of Code of Civil Procedure former section 1032, subdivision (b), as it read before the statutes governing recovery of costs were substantially revised in 1986 . . . ." (*Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 441.) Under the former statute, courts had discretion to deny costs to defendants in instances where they were united in interest or made defenses in the same answer. (*Ibid.*) While the current statute has eliminated the discretionary language for defendants united in interest, the court retains discretion under section 1033.5 to award only those allowable costs that are "reasonable in amount." (1033.5, subd. (c)(3).)

united in interest and shared the same counsel].) The *Slavin* court recognized that " '[i]n those instances in which several defendants are united in interest and/or join in making the same defenses in the same answer, the allowance or disallowance of an award to prevailing defendants lies within the sound discretion of the court. [Citation.]' [Citation.]" (*Id.* at p. 726.)

In this case, the same counsel represented both Drs. McCormack and Eyster in the litigation and Dr. Eyster was dismissed from the case in September 2011, well before the trial began in late January 2013. Dr. McCormack argued that the court should apportion five percent of the costs to Dr. Eyster as his involvement in the case was "wholly peripheral"—it was McCormack who was the target defendant whose care and treatment of Duncan was at issue. The trial court agreed with this assessment, and the record supports the court's allocation of costs between the defendants. "The trial court heard the evidence and was in the best position to determine apportionment of the value of the work performed by counsel for [Drs. McCormack and Eyster] and allocate the costs accordingly." (*Slavin*, *supra*, 25 Cal.App.4th at p. 726.) We discern no abuse of discretion.

Duncan also argues that the court abused its discretion in allocating and then taxing only a half hour of the expert witness fees to the preparation of two declarations prepared in support of McCormack's motions for summary judgment.

In his motion to tax costs, Duncan challenged the time spent by Dr. Peter Weber in the preparation of his expert witness declarations but other than asserting that an expert witness was "unnecessary," he offered no evidence challenging the time spent on the declarations. On appeal, he argues simply that it is impossible to believe that only a half hour of the 11.5 hours billed related to the declarations.

"A 'verified memorandum of costs is prima facie evidence of [the] propriety' of the items listed on it, and the burden is on the party challenging these costs to demonstrate that they were not reasonable or necessary. [Citation.]" (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1486.) Once costs are challenged in a motion to tax, the burden shifts to the prevailing party to prove his or her costs. (*Jones v.*

Dumrichob (1998) 63 Cal.App.4th 1258, 1265 (*Jones*).) In the absence of any contradictory evidence, the declaration of counsel is sufficient to meet this burden. (*Ibid.*)

In response to Duncan's objections to the proposed order on the motion to tax costs, Dr. McCormack submitted invoices from Dr. Weber detailing the time he spent reviewing medical records and deposition transcripts, and finalizing the motion for summary judgment declarations. Counsel for Dr. McCormack asserted in his declaration that Dr. Weber billed only a half hour for preparation of his declarations in support of the motions for summary judgment, and noted that counsel for Duncan was "well aware that Claudia Lozano from our office drafted the declarations for Dr. Weber to review and sign; thus the majority of the time invested in preparing the declarations was attorney time." The declaration supports the court's costs award; it was sufficient to prove the expert witness fees. (*Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1486.)

Finally, Duncan contends that McCormack's section 998 settlement offer to waive costs in exchange for a dismissal of the action with prejudice was not made in good faith, but rather as a predicate to obtain large expert fee award.

Under section 998, subdivision (b), "any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time . . . ." Whether a section 998 offer was reasonable and in good faith is a matter within the sound discretion of the trial court. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700.) "[T]he reasonableness of a defendant's offer is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known *to the defendant*. It goes without saying that a defendant is not expected to predict the exact amount of his exposure. If an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable." (*Id.* at p. 699, fn. omitted.) A

plaintiff who rejects a section 998 offer and who does not obtain a more favorable result at trial cannot recover postoffer costs, must pay the defendant's costs from the time of the offer, and may be held liable for a reasonable sum to cover the defendant's expert witness fees. (§ 998, subd. (c)(1).)

Here, Dr. McCormack served a section 998 offer to settle the action by way of a dismissal in exchange for a waiver of costs. Duncan argues that the offer could only be viewed as a token offer given that no money was offered, and that Dr. McCormack had previously offered to settle the case for $20,000.00.[4] We conclude that the argument lacks merit.

At the time the section 998 offer was served in August 2011, Dr. McCormack could reasonably have perceived himself to be fault free and to have a significant likelihood of prevailing at trial. (See *People ex rel. Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1273 [modest settlement offer consistent with § 998 where defendant has significant likelihood of prevailing at trial].) He had retained Dr. Weber to support his defense, and Dr. Weber had opined that he did not cause Duncan's claimed injuries. And, Duncan had failed to retain an expert witness. He should have surmised that under these circumstances, his likelihood of prevailing a trial was slim. "[R]espondent's offer carried a significant value to appellant[] because, if accepted, it would have eliminated appellant['s] exposure to the very costs which are the subject of this appeal . . . ." (*Jones, supra,* 63 Cal.App.4th at p. 1264.)

III. DISPOSITION

The order is affirmed.

[4] Duncan alleges that before he filed his complaint, McCormack offered him $20,000.00 to settle his claims.

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Rivera, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.